United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1220

To be argued by
GRETCHEN WHITE OBERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1220

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN DIOGUARDI,

Defendant-Appellant,

—and—

VINCENT ALOI, RALPH LOMBARDO and JOHN SAVINO,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT DIOGUARDI

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QUESTIONS PRESENTED

1. Whether the judgment must be reversed either because the Government was permitted to prove a course of criminal conduct not alleged in the indictment, or alternatively, because the prejudicial effect of this evidence of other crimes far outweighed its provative value.

2. Whether the judgment must be reversed on Counts 1 and 18 (the conspiracy count and the false offering circular count), because the trial court failed accurately to define the offenses charged and their respective elements.

3. Whether the justment must be reversed on Count 9 (the wire fraud count), because the Government failed to prove that the use of the wires, alleged therein, was "for the purpose of executing" the scheme to defraud; and because the trial court erroneously charged that guilt depended upon a determination that the call was a means by which the conspiracy, not the fraudulent scheme, was carried into effect.

4. Whether the judgment must be reversed because the prosecutor improperly and prejudicially vouched for the credibility of the major witness against appellant.

5. Whether the Government's failure to obey the trial court's direction or to answer appellant's requests concerning electronic surveillenace requires remand for a hearing.

6. Whether the judgment must be reversed on the basis of arguments made by co-defendants on this appeal, and adopted by appellant pursuant to Rule 28(i) FRAP.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1220

UNITED STATES OF AMERICA,

Appellee,

-v.-

JOHN DIOGUARDI,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR THE APPELLANT DIOGUARDI

STATEMENT PURSUANT TO RULE 28(3)

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Knapp, D. J.) rendered on February 5, 1974, wherein appellant was convicted, after a jury trial, of one count of conspiracy to violate 15 U.S.C. §§ 77q(a), 77s & 77x; one count of wire fraud (18 U.S.C. § 1343), one count of using a fraudulent offering circular in violation of 15 U.S.C. §§ 77s & 77x,* and sentenced to consec-

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* The indictment originally named 16 co-defendants but only 4 of the named persons stood trial until verdict. The defendant Fusco was severed during trial because of illness; 3 named defendants testified as government witnesses; and the remaining defendants were severed prior to trial.

utive terms of imprisonment totalling 10 years, and to 5 years consecutive probation.

B. Statement of Facts

1. The Prosecution Case

Edmund Graifer admitted his involvement in the conspiracy, in another federal case involving two million dollars in stolen securities, in loan-sharking and various infractions of State law (391-96).* He had pleaded guilty to two counts of securities violation and had not yet been sentenced. The Government had promised to advise the sentencing Court of his cooperation and Graifer hoped to get as light a sentence as possible (394-95).**

Graifer testified that in 1967 or 1968, he bought 50% of At Your Service Leasing Corporation (hereinafter, AYSL) (397). It had about $100,000 in debts on which Graifer and his partners were personally liable (400-01). They decided to go public to off the debts. In July of 1969, Andrew Nelson of Tec-Ec Systems, agreed for a $ 20,000 fee, to take care of all details to get the stock issue under way (405-08). Tec-Ec drew up an offering circular (408) and got TDA Securities as underwriter (412).

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* References to the trial minutes, which are being filed in triplicate with the Court, are by page number. Reference to the appellants' joint appendix are prefaced by "A."

** It was also brought out that Graifer had State charges pending for selling 50 mortgaged cars, and that he believed these charges would be dismissed (660-63). The pledged cars had a value of $ 300,000 (759). He received $400,000 from the transaction involving stolen securities and did not report it on his tax returns (711-12). He received over $1,000 a week from loan-sharking, which he also had not reported (736).

Graifer met the officers of TDA Securities, Gilbert Dragani and Donald Fisher, in early April of 1970 (417-18). Dragani told Graifer that he would have to place the issue and that TDA would do the back office work (419-20).*

By late April, no stock had been sold (427), and Graifer told his partners he would try to find someone to sell the issue. He knew the defendant Lombardo, who had leased cars from AYSL. Over objection, Graifer testified that Lombardo had said he was being followed by the FBI and by switching cars he would make it harder for them (429-31).**

Graifer testified that he and Lombardo went to Florida to see Buster Aloi about the offering (431-32). Buster told Graifer to contact Michael Hellerman. Over objection, Graifer testified that Buster said Hellerman and appellant were partners and appellant would take care of seeing that Hellerman did the deal properly (475-78).

Graifer testified he met Hellerman at the Riverboat Restaurant in early June, 1970, when Lombardo and Jack Kelsey were present (481-83). Before they met, Lombardo told Graifer that if Hellerman could do the deal, Lombardo wanted to

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* When the prospectus was filed, it also did not disclose that Tec-Ec was to receive a fee, although it did state that $20,000 was paid for miscellaneous legal and other fees (878-79).

** Lombardo's motion for a mistrial was joined by all defendants (426-442). The trial court reconsidered his ruling to permit this testimony into evidence and decided it was improper, however, he denied the mistrial motion (449-458).

be put back on the AYSL payroll (482). Hellerman told Graifer he could do the deal, and wanted $45,000 under the table (484). However, Hellerman said he had to consult Lombardo and appellant before a final commitment could be made (485). Hellerman and Lombardo then took him to 28th Street and 5th Avenue where they said appellant had his office. They entered the building, and left him in the car, telling him appellant was "hot" and it was best for Graifer not to meet him (486-88). At appellant's office, Hellerman asked for $22,500 up front which Lombardo agreed to put up (489-90). When they came out, Hellerman said he could do the deal. Graifer then called Buster Aloi from a phone booth, and all three spoke to him (490-91).

Graifer testified that a week after this meeting, he ran into the co-defendants Fusco and Savino. When Graifer told them Hellerman was doing the AYSL offering, Fusco said he was a cheat and swindler, who owed them $10,000 (509-11). Two days later, Lombardo called Graifer to say that Hellerman couldn't dispose of the stock and the deal was off (516-17).

Graifer testified he then flew to Florida to see Buster Aloi about his feeling that Fusco and Savino had called off the deal (521). Buster called his son Vincent and spoke to him in Italian (521-23). Buster told Graifer not to worry, everything would be straightened out (526).

Graifer testified that a few days after he returned from Florida, Hellerman called to say the deal was on again (527-

28). When Graifer saw Hellerman, he said that the $45,000 would be divided so that Savino and Fusco would get $10,000, Lombardo would get $10,000* and appellant, the rest (530).

After this conversation, Graifer testified they went to the same 5th Avenue building so Lombardo could see appellant. Lombardo left him outside, went in and came out later with Hellerman (535). Hellerman said everything was okay and that front money was no longer necessary (535). Immediately after this, the three went into the cigar store, called Buster Aloi to tell him that everything was worked out (536).

In late July, the AYSL closing took place at Hellerman's office (538). Graifer testified that he, one of his partners, Lombardo, Murray Winter, Dragani and Fisher of TDA and Nelson and Miller of Tec-Ec were present (538-39). Hellerman gave them checks totaling about $80,000 and Murray Winter wrote a check for the difference, to make up the $150,000 total (541-42).** The offering period had expired, but Hellerman said they would back-date everything (546). TDA then deducted their commission and gave Graifer checks totaling $127,500 (547). The checks bounced a number of times and finally cleared (548-49). Graifer testified he deposited the money into the AYSL account, then cashed a check for $45,000 and gave the cash to Lombardo (553). He also told Lombardo that he would put him on the pay-

* It was brought out later, over objection, that Hellerman owed Lombardo the money from a loanshark loan.

** Winter later testified and admitted writing the check (3251-54).

roll (559).

Graifer testified he later learned from Hellerman that Hellerman was manipulating the price of the stock (574-75). Later, Hellerman loaned Graifer $37,500 from the after market manipulation because Hellerman didn't need the money (578-79). Lombardo and Hellerman subsequently met him at 5th Avenue and 28th Street and told him he had to pay the $37,500 back to Hellerman in 30 days (582-84).

Graifer testified under oath before the SEC in September and December of 1970.* Graifer previously swore that he met Hellerman through Dragani (988-89); that only Dragani, Fisher, Nelson, Miller, his partner and himself were present with Hellerman for the closing (994-95); that Lombardo was the insurance consultant for AYSL and received his salary for this work (1000-02); that he never borrowed $37,500 from Hellerman (1002), but that he cashed a check in this amount as an accommodation to Hellerman and gave him the cash (1004-05); that Hellerman never got $45,000 for the AYSL stock deal (1008; 1010), but that Graifer took the $45,000 himself and later put it back into AYSL (1012). Graifer attempted to explain the SEC testimony by stating that Hellerman told him to lie before the SEC and Lombardo told him to do whatever Hellerman said (1147).

* Defense offers of such sworn testimony as affirmative evidence were rejected throughout the trial, and each time the testimony came in, it did so only for the purpose of impeachment. See, e.g., 954-56; 1051-53.

Andrew Nelson, of Tec-Ec Systems, testified he pled guilty to two counts in the AYSL indictment and had not yet been sentenced* (2691-95). His company had agreed to prepare the AYSL public offering for a $20,000 fee (2696-98). Nelson knew from the beginning it was "far from a good issue" (2702). They had difficulty in finding an underwriter and finally got TDA Securities (2704). Graifer told them he had the issue placed, and he wanted the underwriter only to do the technical work in connection with the sales (2704).

Nelson stated that after the effective date (April 8, 1970), he was given names of only a few purchasers. Graifer finally called, saying he found someone to buy the issue and asked Nelson to meet him at Stoma Investment Co. (2717).

Nelson testified that he went there and met Hellerman, who said "he was the head of an investment group that had agreed to buy up all the unsold shares of At Your Service Leasing Company" (2775-76). Hellerman said he would furnish a list of purchasers so TDA could make up confirmations (2778). Hellerman gave him the list before the July 7 cut-off date (2780), and TDA made up the confirmations and brought them to Hellerman's office (2781). This date passed and the boxes of confirmations and offering circulars remained in the office (2783). Nelson was then told by Hellerman, that the deal was being changed, "rather than having many small purchases . . . there was going to be a few

* Nelson also admitted that he participated in a second stock fraud (Globus) with Hellerman after the AYSL deal was finished, for which he was not being prosecuted.

large blocks bought" (2784). They eventually held the closing (2800). Hellerman later told Nelson he got $45,000 from Graifer for the offering and also made money on the after market manipulation (2807).

Over objection (2792-94; see also, 2787-90), Nelson testified that after the closing, he was nervous about the situation and Steven Schustek (who was not named in the indictment and who did not testify), told him to make money and keep his mouth shut. Schustek said "if you say anything you might get hurt . . . you know, Michael's friend is Johnny Dio" (2811).

Donald Fisher, of TDA Securities, testified that he had pleaded guilty to two counts of the AYSL indictment and had not been sentenced (3173-74). Nelson had brought him the AYSL offering, telling him it was "pretty much all sold" and they needed an underwriter only to do the administrative work (3180-81). Fisher looked at the AYSL offering circular, thought the stock was "pretty bad" but agreed to go on the prospectus as underwriter (3182).

Fisher stated that the closing date went by; no money was turned over to him (3191) though he previously made up confirmations from the first list of names supplied by Hellerman (3189). He knew that after the closing date, the offering had to be withdrawn and a new prospectus drawn up (3191). The closing was finally held on July 27 (3201). Fisher knew he would have to back date the checks and confirmations and this was done by his office (3201-05).*

* Fisher identified the names of various purchasers, some of whom were later called by the Government. They testified that they bought the stock because Harry Parsons, a broker, recommended it (3531-3586).

After the closing, TDA made a market in the stock (3218). It was essentially a "closed circle" where "everybody keeps selling to everybody" (3218). Eventually, another broker was left holding the bag and TDA went into receivership (3219).

Michael Hellerman, testified that in June of 1970, Lombardo told him about AYSL (1743). He told Lombardo he wanted $45,000 under the table to sell the first 50,000 shares (1752), and $22,500 up front to pay brokers to push the stock (1759). Lombardo said that even if they agreed to do the deal, Buster Aloi and appellant had to agree before they could go into it (1758).

Hellerman testified he discussed the deal with appellant, who told him to bring Lombardo to his office, but not to bring Graifer (1761-63).

Hellerman testified he met Graifer, Lombardo and Kelsey at the Riverboat Restaurant and explained the deal (1764-65). They then went to appellant's office, leaving Graifer in the car (1769). After they discussed terms, Lombardo asked appellant to call Buster Aloi to confirm the deal (1771). Lombardo and Hellerman went to a phone booth downstairs, and Lombardo placed the call (1772-73). Appellant came down and spoke to Aloi after Lombardo and before Hellerman (1774). Graifer came in after appellant left and spoke to Aloi after Hellerman finished (1775).

Hellerman testified that he contacted his cousin, Ira Schultz, about retailing the stock (1778). They then went to appellant's office (1780). Hellerman testified he told Steven Schoengold to pick up Schultz and take him there, but Schoengold

was not present when they met appellant (1781). According to Hellerman, appellant and Schultz agreed that Schultz would try and do the deal (1782).

Hellerman testified that within a week, Lombardo delivered the $22,500 to appellant (1784). Kelsey was present (1784). Appellant told Kelsey to deliver the money to Schultz (1785). Hellerman testified that he and Kelsey gave the money to Schultz, who put it in his vault at the Chemical Bank (1787-88).

Hellerman had testified that if the deal was not completed in 3 weeks, the $22,500 would have to be returned (1770). Within 10 days, there had been no progress, so Kelsey met Schultz in front of the Chemical Bank and Schultz gave him an envelope containing $22,000 (1791). Hellerman and Kelsey used this money for themselves (1793) and Hellerman said he repaid appellant by cashing a $22,500 check on his mother's account (1793).

When Kelsey and Schoengold testified, they did so about this part of the transaction and told essentially the same story as Hellerman (Kelsey, 1514-30 ; Schoengold, 2987-2995).

Hellerman testified that Lombardo was at the office when he returned the $22,500 to appellant, and they spoke about the deal. Hellerman told Lombardo that he could do the deal without front money (1802). Lombardo said Fusco and Savino had told Buster Aloi that Hellerman would rob them, but he would try to approach Buster again now that it could be done without front money* (1801-02). When they saw appellant, Lombardo told him what Hel-

* Hellerman explained that he would get buy and sell confirmations dated 2 weeks apart, showing a buy at 3 and a sale at 5-1/2. He would tell people that they had a sure 2-1/2 point profit on the stock (1806).

lerman had said and that he would try to reactivate the deal with Buster (1803).

Hellerman testified he spoke to appellant about a week later and was told that Vincent Aloi approved the deal with two changes, which Lombardo would explain (1832). Lombardo later told him that Savino and Fusco were to get $10,000, and Lombardo was to get $10,000 (1836-37). Hellerman stated he complained about this to appellant, who agreed it was unfair and told him not to go ahead with the deal (1839). Hellerman told appellant he was going to do it to pay off a loan owed to a man named DiLorenzo (1839). Lombardo and Hellerman then went to appellant's office and put the new terms on record (1840-44). Graifer was downstairs and when they finished, they went to the cigar store and Graifer, Lombardo and Hellerman called Buster Aloi (1844-45).

Hellerman testified that he had TDA Securities make up the confirmations (1846) and he sold the stock by telling people they had a guaranteed profit (1851) or by paying brokers $ .50 a share to move it (1852). The closing was held at Hellerman's office (1855-1865). When the checks to TDA finally cleared, Hellerman testified he had a conversation with appellant who told him that the $45,000 had been divided so that Lombardo got $10,000, Fusco and Savino got $10,000, and that appellant gave $25,000 to DiLorenzo (1873-74).

Hellerman testified that after the closing, he began to manipulate the market in AYSL shares (1881), using Gary Fredericks (1881-82) and Arthur Sommers (1883). Although Hellerman had com-

plained about not getting any money out of the offering (1839) and had tried unsuccessfully to borrow $10,000 from Lombardo to finance the after market manipulation (1867-74), he testified that when he received a $37,500 check from TDA, he didn't need it and lent the money to Graifer (1894-98). According to Hellerman, appellant was angry about the loan and it was agreed that Graifer would pay the money back within 30 days (1899-1905). According to Hellerman, he later learned there was a dispute between Vincent Aloi and appellant over the $37,500 and Graifer kept the money (1907-09).

Hellerman testified that when Graifer told him he was being investigated by the SEC, Hellerman told Graifer to say they met through Dragani (1905-06).

Before Hellerman testified, defense counsel requested that the proof be confined to the fraud charged in the indictment and objected to any proof by the Government that appellant had 25% of all the money Hellerman made in his various stock swindles.* The Court refused to limit the proof (171-175). This objection was renewed many times when Hellerman and other Government witnesses testified (see infra, testimony of Kelsey, Schoengold, Winter).**

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* The ground was that to permit such open-ended testimony was unduly prejudicial, as it proved other crimes, and was especially unfair because appellant had been acquitted on one of the prior stock frauds.

** Counsel for other defendants made similar objections when testimony of prior criminal acts was introduced, for example, Hellerman's testimony concerning Lombardo's alleged loansharking.

When Hellerman testified on direct, he admitted that he pled guilty to three indictments charging him with three stock frauds, Imperial Investment Corp., Belmont Franchising Corp. and AYSL (1706-07),* and admitted committing other crimes for which he was not prosecuted (1709-10).** He further testified that in early 1969, he and appellant reached an agreement whereby appellant was to receive 25% of everything Hellerman did (1716-18).

Hellerman was also permitted to testify, over objection, that he and appellant owed Louis Ostrer and Anthony DiLorenzo $70,000 from a prior securities transaction (1840, 1876-80a). Hellerman wanted to go into the AYSL fraud in order to pay off the debt even though appellant had agreed the deal was unfair because Hellerman would make no money on the offering, and had told Hellerman not to do the deal (1744-49, 1839).

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* On cross, Hellerman testified that 70 counts in the Imperial case were dismissed (2015-16); as were thirty-eight counts in the Belmont case (2016-17) and that he pled to a one count information in Imperial. Before he made the agreement with the Government to dismiss these counts, he was afraid that if he were sentenced consecutively on the indictments, he would have to spend the rest of his life in jail (2041-43).

** These other crimes were the following: Hellerman was involved in a forged check scheme to obtain over a half million dollars (2052-54); involved in the fraudulent manipulation of Minute-Approved Credit (2057); Computer Microdata (2059-60, 2122); Globus (2100; 2120-22); involved in a scheme to extort $100,000 from two companies (2102-04); involved in a stock manipulation, Automated Information Systems (2125-26); involved in an attempted fraud on a Swiss Bank (2135-38); involved in an attempt to bribe State Court judges and a State Liquor Authority investigator (2141-43); participated in a scheme involving the transfer of $150,000 in stolen treasury bills (2144); involved in obtaining a stolen credit card (2146-47); in purchasing stolen property (2147), and in aiding another to evade federal income taxes (2148).

John Kelsey had testified before Hellerman took the stand. He stated that in October of 1969, he went into the brokerage business with money borrowed through Hellerman (1500). In 1969 and early 1970, he participated in the Imperial fraud with Hellerman (1502). Hellerman introduced him to appellant in 1969 (1504).

Kelsey was asked if he heard discussions between Hellerman and appellant during 1969 and 1970 concerning the financial arrangements between them (1506-07). At side Bar, the court refused to limit the proof to financial arrangements with respect to AYSL (1507-09). Over objection and motion for a mistrial, Kelsey testified that in 1969, Hellerman told appellant he would get 25% of any Hellerman deal, but "then there was another case when that changed . . . ; it was in the spring during the Belmont situation . . . " when Hellerman told everyone how well the stock was doing, and appellant said thatnow he was going to get 50% (1510-11).

When Kelsey met Graifer and Hellerman at the Riverboat, Hellerman boasted about the Belmont and Imperial deals, telling Greaifer they were over a million dollars, and that AYSL was a "peanut deal" for him to do (1517).

On cross-examination, Kelsey admitted giving prior sworn testimony that he never heard Hellerman say appellant was his partner, but claimed that testimony was false (1571-85).* Kelsey also gave sworn testimony at the SEC, which he, at first,

* Defense offer of the testimony as affirmative evidence was rejected.

refused to disavow as entirely false, and then claimed was false on redirect (1648-53). At the SEC, Kelsey swore that Ira Schultz turned down the AYSL deal and that was why Hellerman got Kelsey, Schoengold and Harry Parsons to do the deal for him (1615-16).

Steven Schoengold testified that he had been an employee of the J. M. Kelsey Co. in 1970 (2953). Hellerman got him the job (2957). He had pleaded guilty to a charge involving Imperial Investment Co. and received a suspended sentence (2959).*

Schoengold testified that a few days after the Ira Schultz episode, Hellerman took Schoengold and Kelsey to appellant's office, where there was some unspecified conversation about AYSL, then Hellerman and Schoengold went to Hellerman's office (2997-98). Hellerman asked Schoengold to sell the stock for a $1 per share bonus (3000). Schoengold agreed, but made no effort to sell any (3000). Hellerman later told Schoengold that he made $80,000 in the AYSL deal (3005).

Before Schoengold gave any testimony relating to the AYSL case, he testified concerning the so-called arrangement whereby appellant had 25% of anything Hellerman did, over objection that such proof "will necessarily involve proof of another crime" (2946; see also, 2897-2909; 2945-52; 2961-73; 3083-87).

Schoengold testified that Hellerman introduced him to

* Schoengold acknowledged that had he been prosecuted on the Imperial indictment, he could have gotten a substantial sentence (3050), and that he wasn't indicted for his participation in Belmont or Tabby's International (3051-52).

appellant in 1969, that in late 1969, throughout 1970, he saw appellant frequently (2962-63), and that he was present in April of 1970, when financial arrangements between Hellerman and Dioguardi were discussed (2968). According to Schoengold, Hellerman and appellant had a discussion about Hellerman having to meet Louis Ostrer (2970). Appellant told Hellerman that he was always "doing something like messing up these deals. What right did you have to put my share of the money into the show with him" (2970). Then appellant said, "This deal is like all the others, right Mike: 50% for me, 25% for you and 25% for Jack and Steve . . ." (2970).

Schoengold also testified that he was present in May of 1970 when Hellerman and appellant discussed a financial obligation to Louis Ostrer and Hickey DiLorenzo (2977). Schoengold stated appellant said, "What are you going to do about Ostrer and Hickey . . . I guaranteed the loan . . . I am on the hook as much as you . . . " (2980). Hellerman replied, "' Well, Ostrer had taken a profit on some of the Belmont stock and also had gotten some of the front money' and that he really only owed Ostrer $60,000 and not $120,000" (2981). When appellant asked what Hellerman was going to do about it, he replied, "Well, it's just too bad. I'm broke and they know it and they will just have to wait"* (2982).

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* Hellerman had also testified that he was broke when the AYSL fraud occurred. On his cross-examination, it was established that he reported income of $471,000 in 1969-1972 and that he had not paid any of the tax owing on the money (2011-12, 2151). Hellerman admitted making a million dollars on his swindles (2011-13) and insisted he had none of it. He denied having

[Footnote continued on following page]

Schoengold also was permitted to testify that when he told Hellerman he read some SEC testimony and that the SEC had Hellerman in the Belmont case, Hellerman told him it made no difference if he were in trouble for only one deal or for all of them because you could always make a deal on all of them, and that when the time came appellant would tell Hellerman what to say and Hellerman would tell Schoengold (3002-03). There was detailed objection to this testimony (3020-23).

On cross-examination, Schoengold admitted he testified before the SEC in December of 1970, and stated that he told the truth at that time (3029). He never told the SEC that appellant participated in or had a share in AYSL although he was asked to name the persons who got the money from the deal(3030-38). He was cooperating with the Government when he so testified (3039).*

[Footnote continued from prior page]
his mother keep the proceeds of the swindles for him (2013-14) and he denied travelling to Switzerland to bury the proceeds, claiming the trip was for pleasure (2054). He also denied having any safety deposit boxes, either in his name or the name of relatives, and denied giving any relatives the proceeds of the swindles to put in safety deposit boxes for him (2047, 2097).

Schoentold testified on cross that Hellerman had a safety deposit box at the First Israel Bank (3053). Winter testified he knew Hellerman had a vault (3344), but he did not know if he had a box in the Bahamas (3323). The first defense witness testified concerning the First Israel Bank box (3670-87) and further defense offer of proof on Hellerman's ownership or interest in other safe deposit boxes was not permitted. See Point VI, infra.

** The trial court refused to admit the sworn testimony as affirmative evidence (3039; 3087-93). The SEC testimony was ultimately read to the jury (3141-51) with the instruction that it was being offered for the jury to decide whether it was consistent or inconsistent with Schoengold's trial testimony (3139-40).

Morris Winter testified he pled guilty to a one count information in the AYSL case, receiving a 6 month sentence which was later vacated (3233-34). He was also named as a defendant in the Belmont Franchising fraud, but the case was nolled (3235).*

Winter testified he first heard of AYSL from Hellerman 2 or 3 days before the closing (3247). Hellerman told him that appellant asked him to do the deal to help Lombardo, who "had a piece of the man who ran At-Your Service Leasing" (3248-49). Hellerman told Winter that he would have TDA write buy and sell confirmations showing a 2 point spread, so that Hellerman could show people a $2 sure profit when he sold them the stock (3256-57). "Everybody fell for it" (3257). Hellerman was then going to arrange for brokers to buy the stock from TDA, then he would manipulate the price since he controlled all the shares (3257-58).

Winter testified that sometime after the after-market manipulation got underway, Hellerman told him that appellant was:

> "asking him for some more money, that he had given him about $50,000 or $60,000 on some of the deals, that he needed Mr. Dioguardi - - Mr. Dioguardi not only wanted the money but wanted an accounting of what Hellerman was making on the deals so he could get his share of it" (3269).

Defense counsel unsuccessfully objected to this testimony (3269).** Winter testified that Hellerman then "counted

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* Notwithstanding his conviction, he was still practicing law as disbarment proceedings had not been instituted as of the date he testified.

** Counsel stated that the objection related back to his ob-

 [footnote continued . . .]

out some bills" from a large amount of money in his desk,* put them in an envelope in his righthand breast pocket, and said, "come on, I have to deliver the money to John, Johnny Dioguardi" (3269). Winter did not see him deliver the money to appellant, but believed he had done so (3270-71).

Thomas Moffit, the owner of the Holiday Inn where Hellerman managed a restaurant in the 1960's, testified that he knew Hellerman and was frequently in the restaurant (3453). He met various customers, including appellant, Fusco and Savino (3456). Moffit made a $20,000 investment in a company, Trimatrix, which Hellerman had promoted and became Chairman of the Board.** The Trimatrix deal went sour in late 1969 or early 1970 (3465).

Moffit testified that Fusco and Savino had invested in the company and wanted to get back the investment, but Hellerman refused to return it (3468-69). Over objection, Moffit was permitted to testify that Savino and Fusco told him they could not get their money back because "Michael Hel-

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[Footnote continued from prior page]
jection to Schoengold's testimony (3083-97) made earlier that morning.

* Winter also testified that throughout the period Hellerman had Stoma Investment Co., Hellerman kept large amounts of cash in his drawer (3357-59), and that Hellerman was rarely short of money (3362).

** The company was developing a device to screen out phony credit cards and Avco, a large public company, was going to produce it (3517-18).

lerman was with Johnny Dio" (3469-70).*

Moffit, appellant and Hellerman had numerous conversations about Trimatrix (3515-16). It was a 100% legitimate deal and was "the most exciting thing in our lives . . . We spoke of almost nothing else" (3516).

2. The Defense

The defense offer to introduce the prior sworn testimony of Graifer, Winter and Kelsey as affirmative evidence of appellant's innocence was rejected as was the offer to prove appellant's acquittal in Imperial (3649-50).

Ira Schultz testified he had been convicted of perjury in connection with the investigation of the Imperial fraud (3709-10).

Schultz stated he never told appellant he would do the AYSL deal; that he never met with Hellerman and appellant do discuss the deal; and that he never discussed the deal with Schustack (3691-3701). At some point, Hellerman asked him to put a package of money in the vault, which Hellerman

* Counsel's objection was stated at side-bar (3471-74). The court then instructed that the statement was not made in the course of the conspiracy and should only be considered against Savino (3474-75). The court then again elicited from Moffit the testimony that Savino said he couldn't get back his money from Hellerman because Hellerman was "with" appellant and he needed appellant's consent (3475). Counsel amplified his objection, arguing that since the hearsay statement was pre-conspiracy, a limiting instruction was insufficient and that appellant was denied his right of confrontation under the Bruton case and this court's Puco decision (3497-3501). A mistrial motion on that basis was denied (3501).

was afraid to carry around and he gave the package back either to Hellerman or Kelsey a few days later (3701-03). From the way Hellerman acted, he believed he was being set-up for something (3702). He also thought he gave a portion of it to Shustack (3783-84).

Joseph Bald testified that he was involved with Hellerman in various stock swindles (3839), and also in an attempt to bribe a public official in connection with one of the cases (3847). Bald pled guilty in one case (3840) and had testified as a Government witness (3843).

In August or September of 1970, Bald asked Hellerman whether appellant was involved in any of the stock cases and Hellerman told him that appellant was not involved in any stock deals (3851). Sometime after this, when Bald and Hellerman met with a man who Hellerman knew was an FBI agent, Hellerman told the agent that appellant was involved. Bald stated he said to Hellerman, "but Mike, you told me that Dioguardi wasn't involved in any stock or Imperial," and Hellerman kicked him under the table and winked at him.* Bald later testified that when he said to Hellerman, "but you told me he was not involved, I saw the anger on his face, like he was up in arms, and I could never forget that look on his face when that occurred" (4070). When Bald later went to the U.S. Attorney's office, he learned that Hellerman was saying that

* Bald believed there was a tape recording made of that meeting, as he thought the U.S. Attorney's office had shown him a transcript (3858-59). The FBI agent testified on rebuttal that that particular conversation was not recorded, though

[footnote continued on following page]

appellant had an involvement in the stock frauds (3680).

John Dioguardi testified that he had been incarcerated since 1970 for violation of the federal bankruptcy laws and had been convicted of an income tax violation (4143). He knew Michael Hellerman through his father Louis Hellerman, a long time friend (4143-45). Appellant met Michael in 1963, when Michael was operating a restaurant (4146-47). He met Hellerman again in 1967, and was invited to Hellerman's new restaurant in Rockville Center (4150-58). Hellerman ordered advertising specialties from his company, Jard Products, and appellant began to go to the restaurant every week with his lady friend, Barbara, as he could meet her there without meeting people who knew his wife (4158-59). Barbara and Michael's girl, Marianne, became friendly (4160). In December of 1967, when appellant left his wife, they no longer went to the restaurant as frequently (4162).

In the spring of 1968, after the unveiling for Hellerman's father, Michael and Marianne visited appellant and Barbara in Bayside. Marianne liked the area and the Hellermans moved nearby in June or July (4182-83). At this point, Hellerman began to discuss Trimatrix (4183-43).* Hellerman

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[footnote continued from prior page]
all the others had been, that he had no notes on the conversation, but that he recalled that appellant's name had not been mentioned (4999, 5011, 5015).

* Trimatrix controlled an invention made by Hellerman's cousin, which could detect fraudulent credit cards. A prototype had been built and if the machine could be marketed, the company would make millions of dollars (4184-86).

offered appellant's company the exclusive right to the special paper on which the cards had to be made to fit the machine (4187-89). Appellant felt that if Jard could get the rights to the paper, it would earn "an untold amount of money" (4190). Hellerman came to see appellant frequently during the period they were interested in Trimatrix (from the unveiling in 1968 until late 1969). At one point Hellerman told him he had 500,000 shares pledged and the SEC was going to approve the issue any day (4193-94). Barbara and Marianne were by then close friends and their daughters had First Communion together (4190-95).

In August of 1969, Hellerman, appellant and Barbara were having dinner together and appellant mentioned a stock, Lilly-Lyn, his son had bought (4195-96). Hellerman told him that although the stock was trading at 18, his attorney was holding shares which could be bought at 11. He told appellant he was buying 1,000 shares for Marianne and appellant should buy 1,000 shares for Barbara (4197-98). Hellerman said it wasn't necessary to put up any money unless the stock fell below 11 and appellant then agreed to take 1,000 shares (4200). When the stock went to 21, appellant told Hellerman to sell. Hellerman then told him $11,000 was needed to buy the stock and after some discussion, appellant borrowed the money and sent it in checks made out to Jazer-Wize, the attorney (4200-03). Although Hellerman told him they would receive the proceeds of the sale in a week, the check

did not come (4208-09). Barbara, in the meantime, had bought a house expecting the Lilly-Lyn profit to be the downpayment (4209-16). When Hellerman learned that Barbara was buying the house, he said he had a friend, Socrates Patras, who could give her a mortgage and also act as attorney on the closing (4216-18). Although the mortgage was originally going to be for 25 years at 7-1/2% (4218), it ultimately was written for 15 years at 8% (4222).

When appellant continued to press Hellerman for the Lilly-Lyn money because the closing on the house could no longer be postponed, Hellerman told him that Patras would advance $10,000 on the closing from funds of Hellerman's and Hellerman would take care of getting the check for the stock when he returned from the Bahamas (4223-27).

In November of 1969, Barbara got $855 for the Lilly-Lyn stock, not the $22,000 that should have been received (4234). Hellerman told them the attorney who held the stock "had goofed" but that he would see that the attorney made good on the money (4236).

At this same period, Jard Products was moving to larger premises and had 2 years left on its old lease (4244-46). Hellerman was present when appellant showed the space to a prospective tenant and told appellant he was giving up his restaurant to open a factoring business with money coming from his father's estate (4247-48). He offered to take over the

old lease and buy the fixtures (4249-51).*

Hellerman moved in February or March of 1970, and appellant began to get complaints from the landlord that the rent was not being paid (4251-52).

In March or April of 1970, appellant read that Hellerman was the co-producer of a Broadway show (4257). At this point, Hellerman still hadn't gotten the attorney to make good on the Lilly-Lyn money. He owed Jard Products for purchases made by the restaurant, and rent and money for the fixtures from the old Jard office space (4257-58). Hellerman had been avoiding him (4252-54), and when appellant finally saw him and asked him why he could afford to invest in a show, but not honor his obligations, Hellerman said his uncle had loaned him the show investment and he would settle his debts when his father's estate was settled (4259-60).

In June of 1970, appellant learned from Patras that Barbara's mortgage was held by Hellerman's mother, not the bank, and that she had written to Patras when the mortgage was executed that appellant and Barbara were not to be told that she held it (4262-64) (Def. Exh. AA).

Around this time, appellant's bankruptcy conviction had been affirmed and he knew he would have to surrender (4276).

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* In the fall of 1969, appellant was also introduced to Kelsey and Schoengold by Hellerman who told him he was loaning Kelsey the money to go into the brokerage business (4237-39). Kelsey and Schoengold purchased advertising specialties and TV sets from Jard (4239).

He was afraid Barbara would lose the house while he was in jail, and asked Hellerman to get a moritorium on payments from his mother until he served his sentence (4277-78). Hellerman gave him a letter, purportedly signed by his mother, agreeing to this (4278-80), but Patras then told appellant the letter was worthless because Hellerman had borrowed $20,000 on the mortgage (4281-82).

Appellant denied that he was involved with Hellerman in the AYSL fraud. He stated that in 1970, Hellerman told him he had a good proposition with a car leasing firm, and asked appellant to lease cars from them for Jard and for himself and Barbara (4295). He also offered appellant free stock and said it was "a sure thing" but appellant said that Lilly-Lyn had been a "sure thing" and "I couldn't get involved in any other sure things with him when I didn't collect the first sure thing" (4296).

On cross-examination, appellant was asked if Hellerman was 'with' him in the way described by Moffit (4383); if appellant put it on record after Paulie Vario abused Hellerman, that Hellerman was "with Johnnie Dio" (4384); whether before appellant went away to prison, he told Hellerman that if Hellerman did anything wrong, appellant would be the one to pull the trigger (4397); whether appellant introduced Hellerman to Jimmy Hoffa's wife (4431); whether he saw Sonny Franzese at Hellerman's restaurant (4446); if he went to the restaurant because it was a hangout (4447-48); whether during the

Belmont fraud, he told Hellerman that he would take 50% of the proceeds of that fraud (4458-61); whether in August of 1970, he needed money to pay his new attorney in the bankruptcy fraud case when his former attorney Joe Brill, became ill, and whether Hellerman gave him $10,000-$20,000 to pay Jerome Londin for the appeal.*

Ralph Lombardo testified in his own behalf and his testimony is set forth in his brief on appeal.

The court's charge is discussed in Points II and III, infra. After deliberation, the jury convicted appellant on 3 counts and acquitted on all others.

* Jerome Londin testified that he was retained by appellant on the bankruptcy fraud appeal and was paid $4,500 by check in March of 1970 and did not represent him in August (4579-83).

ARGUMENT

POINT I.

THE JUDGMENT MUST BE REVERSED EITHER BECAUSE THE GOVERNMENT WAS PERMITTED TO PROVE A COURSE OF CRIMINAL CONDUCT NOT ALLEGED IN THE INDICTMENT, OR BECAUSE THE PREJUDICIAL EFFECT OF THIS EVIDENCE OF OTHER CRIMES FAR OUTWEIGHED ITS PROVATIVE VALUE.

The Government was permitted to introduce proof not only that appellant was involved with Hellerman in the AYSL fraud charged in the indictment, but that beginning in 1969, appellant and Hellerman entered into an agreement whereby appellant was to receive a portion of the profits from all of Hellerman's swindles. This evidence was admitted to prove that the AYSL fraud was part of an ongoing criminal arrangement between Hellerman and appellant. Proof that Ostrer and DiLorenzo were owed $70,000 from one of the prior swindles was admitted on the additional theory that it was the motive for the AYSL fraud. We submit that this evidence was improper for two reasons: First, it constituted a variance from the crime charged in the indictment so substantial that it amounted to constructive amendment of the indictment, interdicted by Stirone v. United States, 361 U.S. 212 (1960), cf. United States v. Pfizer, 426 F. 2d 32 (2nd Cir., 1970), aff'd. 404 U.S. 548 (1972); second, assuming that it came within the purview of the indictment, its prejudicial effect so far outweighed its probative value, if there was any, that it should not have been received. United States v. DeCicco, 435 F. 2d 478 (2nd Cir., 1970); United States v. Byrd, 352 F. 2d 570 (2nd Cir., 1965); Cooper v. United States, 232 F. 2d 81 (2nd Cir., 1916), cert. denied, 241 U.S. 675; Marshall v. United States, 197 F. 511 (2nd Cir., 1912).

Proof that prior to the crime charged in the indictment, appellant had 25% of everything Hellerman did beginning in 1969, and that this arrangement changed during the Belmont fraud, only to the extent that appellant now was to receive 50% of everything, came in through Kelsey, Hellerman, Schoengold, and Winter, without any limiting instruction.* The evidence was offered "to show a partnership arrangement that began in 1969 and continued right to this case in question" (1508). The Government stated that AYSL could not be tried as an isolated event (2906) and that the Government had to be permitted to prove the true nature and extent of the relationship between Hellerman and appellant (3085-86). The Court at one point characterized the testimony as proof "this conspiracy was part of an on-going arrangement" (2346), and concurred in the Government's theory of admissibility, later characterizing the Government's case against appellant as one which could be viewed as an overall conspiracy between Hellerman and appellant for Hellerman to raid the public and for appellant to get a percentage of whatever Hellerman made (colloquy, 4327-30). The Court believed that because of the nature of this proof, the Government would be:

> "Entitled to a charge that he [appellant] didn't have to know what was going on in At Your Service Leasing, if he is a member of . . .

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* The exact pages of the transcript involved are the following:
Kelsey: 1506-1512
Hellerman: 1716-18; 1744-1748; 1840 and colloquy 1876-1880a; 2392-93
Schoengold: 2897-2909; 2945-52 (colloquy); 2969-71; 2977-83; 3083-87 (colloquy)
Winter: 3268-69

> a conspiracy with Hellerman to go out and raid the public, he didn't have to know what Hellerman was doing." (4330)

Whether or not he gave this charge, the trial Court was certain "the jury will infer that from what I say in general about conspiracy law" (4330).

The charge on conspiracy actually given was so ambiguously worded, that not only did it fail to define the offense charged in the indictment (see Point II), but it also permitted the jury to find, as to appellant, that he became a member of the conspiracy charged in the indictment, by intending to associate himself in any scheme, the object of which was "obtaining moneys from the public by fraudulently pumping worthless securities into the ordinary channels of commerce . . .." (A. 98 , 5492).

The vice of this is that appellant was not charged "under an indictment drawn in general terms" where a conviction could rest upon a showing that appellant joined in a general overall conspiracy with Hellerman to raid the public. Stirone v. United States, supra, 361 U.S. at 218. For whatever reasons, the Government chose to present the case against appellant in three separate segments, not as one conspiracy stretching from 1969-1970 and encompassing the Imperial, Belmont and AYLS stock manipulations. The grand jury in this case was satisfied to charge that appellant's conduct in the AYSL case evidenced his participation in a conspiracy to violate specified federal statutes with regard to that stock offering. To paraphrase Stirone, 361 U.S. at 217, neither this nor any other court can know that the grand jury would

have been willing to charge that appellant's relationship with Hellerman between 1969 and 1970 constituted a general conspiracy to loose Hellerman on the public, so that appellant didn't have to know what was going on in any particular stock manipulation in order to be guilty of various federal crimes.

The grand jury presented one set of charges, the Government tried the case to the jury on an entirely different basis, and the Court charged in terms of the Government's theory, not the indictment. As was held in Pfizer, supra, 426 F. 2d at 639, had the Government relied on a general course of conduct throughout these years, then such instructions and proof might have been proper. But the open-ended proof and the amorphous charge cut the Government loose from the issues framed in the indictment and allowed the jury to convict upon a theory of guilt which the grand jury did not charge. Cf. Pfizer, supra, 426 F. 2d at 639. "While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." Stirone, supra, 361 U.S. at 217. See also Gaither v. United States, 413 F. 2d 1061, 1972 (D. C. Cir., 1969).

Here, appellant had to defend himself in three separate trials on the charge that he conspired with Hellerman as to each of the three stocks. There is a fundamental unfairness in giving the Government the ability to divide the prosecution into separate indictments, each requiring a separate trial as to a

separate stock, and then allowing it to enlarge the final indictment to encompass an overall conspiracy, on the theory that appellant's activities with Hellerman in AYSL could not be viewed except as part of the total picture. This kind of unfairness was not present in Stirone or Pfizer, where only one charge and one trial was involved, and make it the more necessary to grant relief on this ground in this case.

Deprivation of such a basic right cannot be discussed as harmless error. Stirone, 361 U.S. at 217. Moreover, even though Stirone was not cited at trial, this kind of error is uniformly recognized as plain error. United States v. Addonizio, 451 F. 2d 49, 75 n. 30 (3rd Cir., 1972).

Even assuming the evidence came within the purview of this indictment, the trial court should have excluded some of the evidence on the ground that it was introduced only to establish propensity, and excluded the rest because the prejudice far outweighed the probative value, and it certainly should not have admitted any of the evidence without some cautionary instruction.

The testimony that appellant had a percentage of everything Hellerman did after 1969,* was admitted to prove that appellant was Hellerman's partner and protector in the business of bilking the public in fraudulent stock offerings, and to establish that the AYSL deal was 'business as usual.' It was evi-

* Hellerman admitted he was involved only in illegal deals after 1969, and this was confirmed by Kelsey. The prosecutor characterized Hellerman in summation as a "criminal of major proportions" (5388), and also stated: "I submit to you the evidence has established that between John Dioguardi and Michael Hellerman, we had a major crime problem in New York City in connection with this case" (5390).

dence of proclivity, propensity and disposition, admitted without limiting instruction and should have been excluded for that reason.

United States v. DeCicco, supra, 435 F. 2d at 482-84, gives an additional reason why the evidence should have been excluded. In that case, the evidence tended to show that the chief Government witness and a defendant "were in the business of stealing art treasures and thereafter dealing in them." This Court held that the prejudice engendered by the admission of the evidence - - even with a specific limiting instruction that it was to be considered only on the issue of intent - - far outweighed its probative value and it should have been excluded. We submit that DeCicco controls the disposition of this case.

In this case, as in DeCicco, the entire defense was impeachment of the principal Government witness by cross-examination and by appellant's own testimony. Appellant did not admit involvement with Hellerman in stock deals and seek to defend on any theory of lack of knowledge or intent. Nor did the Government's case raise any issue as to whether appellant knew what he was doing when he agreed to go into the AYSL deal. "This is not a case where, if one accepts [the witness'] testimony at face value, the statements and acts of the defendants lead to equivocal inferences." United States v. DeCicco, supra, 435 F. 2d at 484. Moreover, as was held in United States v. Byrd, supra, 352 F. 2d at 574-75, from the quality of proof standpoint for proving know-

ledge and intent, the probative value of the evidence was cumulative. The evidence came from the mouths of the same witnesses who implicated appellant in the AYSL fraud. If the jury believed their testimony as to appellant's participation in this stock fraud, the relating of appellant's prior association with Hellerman in other stock frauds added little or nothing to a revelation of appellant's state of mind.* If the jury had disbelieved the Kelsey-Hellerman-Schoengold testimony as to the AYSL deal, it is not very likely they would have believed these witnesses as to appellant's overall involvement with Hellerman in all his other frauds. See also, United States v. Goodwin, 492 F. 2d 1141, 1148-51 (5th Cir., 1974).

One part of the prior partnership in crime evidence was testimony that AYSL grew out of the Belmont fraud, where Hellerman ended up owing $70,000 to Ostrer and DiLorenzo, which appellant guaranteed. The Government offered this on the theory of motive.** The trial proof showed that Hellerman was motiva-

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* Moreover, in a case such as this where it is impossible for the jury to find the existence of the conspiracy to defraud without finding the fraudulent intent of the participants, "the moment the fraudulent scheme is established, there is no necessity for resorting to other transactions . . ." to establish intent. Marshall v. United States, supra, 197 F. at 515.

** In summation the Government argued:

> "Now, you also heard testimony about a Hickey DiLorenzo and Louis Ostrer in relation to activities in connection with the Belmont fraud.
>
> "The Belmont fraud, if you may recall the testimony, got into the At Your Services Leasing fraud.

[Footnote continued on following page]

ted to do the AYSL deal, even though he got no money from the initial $ 45,000 and even though appellant told him this was unfair and not to go ahead with the deal because Hellerman wanted to pay Ostrer and DiLorenzo the money owing them from the Belmont fraud (1839).*

Where a defendant has pleaded guilty, it is not competent for him to testify as to his motives of intent in doing the acts charged. Cooper v. United States, supra, 232 F. at 85. Hellerman had pleaded guilty and his motive and intent was not in issue in this case. Proof that Belmont was a motive for Hellerman doing AYSL even though he got nothing from the first part of the manipulation presumably served to show that his ad-

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[Footnote continued from following page]:

> "So the Belmont fraud led into the At Your Service Leasing Fraud. And in connection with Belmont, you heard - -
>
> * * * [objection]
>
> "Mr. Schreiber: The government submits the motives for some of the defendants to participate in the At Your Service Leasing Fraud was the fact of the Belmont fraud.
>
> * * * [objection]" (5412-5413)

* Any notion that appellant forced the deal on Hellerman is dispelled by Schoengold's and Winter's testimony. Schoengold stated that Hellerman told appellant it was too bad Ostrer wanted money; he would have to wait until Hellerman was ready to pay him (2980-82). No one testified that appellant told Hellerman to go and find another deal to pay Ostrer off, or to get the money together immediately. Winter testified that Hellerman told him that appellant asked Hellerman to do the deal to help out Lombardo (3248-49). Thus, during the salient period, Hellerman never claimed that appellant got into AYSL to pay off Ostrer.

mission of guilt was warranted. It probably was unnecessary because there was testimony from Schoengold that Hellerman made $ 80,000 from after-market manipulation. This certainly established that he wasn't in the deal for no reason. While the Belmont evidence marginally served to bolster Hellerman's credibility, it was admitted without limiting instruction and its prejudicial effect as to appellant so outweighed its limited probative value, that it should have been excluded.

There were other instances where testimony about Hellerman's longstanding criminal relationship with appellant came into the trial improperly.

Moffitt was permitted to testify that, long before the AYSL conspiracy began, Fusco and Savino told him Hellerman was "with Johnny Dio" (supra, p. 17). Although this testimony had some relevance to those defendants, this was a joint trial. The testimony constituted prejudicial hearsay as to appellant and should not have been admitted over objection. United States v. DeCicco, supra, 435 F. 2d at 485; Cf. Bruton v. United States, 391 U.S. 123 (1968); United States v. Puco, 476 F. 2d 1099 (2nd Cir., 1973).

Nelson was permitted to testify that Shustek told him if he said anything about the AYSL deal, he might get hurt because "Michael's friend is Johnny Dio" (supra, p. 7). This was prejudicial hearsay which should not have been admitted over objection. Shustek did not testify and he was not named

by the Grand Jury as a co-conspirator. There was no reason for omitting Shustek's name from the list of co-conspirators named in the indictment, and it must be assumed that had the jury intended him to be considered a co-conspirator, then his name would have been included.

The Government cannot be permitted to expand the scope of the conspiracy by including lists of names in its bill of particulars and designating them co-conspirators. To permit this would be to leave the prosecution "free, in a way which is constitutionally grave whether or not highly probable, to name someone different from the one intended by the grand jury. A prosecutorial power 'to roam at large' in this fashion is not allowable" United States v. Agone, 302 F. Supp. 1258 (S.D.N.Y., 1969).

In summary, the Government was permitted to prove a course of criminal conduct between appellant and Hellerman totally outside the scope of the conspiracy charge framed in the indictment. The Court's failure to limit the proof and its charge on the conspiracy count permitted the jury to find that appellant became a member of the AYSL conspiracy by finding that he associated himself with Hellerman in an on-going scheme, beginning in 1969, to obtain money from the public in fraudulent security transactions, even though the grand jury did not frame the conspiracy count in this fashion. Even assuming that the proof and the charge did not constitute amendment of the indictment

within the ambit of Stirone v. United States, supra, the prejudicial impact of this proof was so enormous and its probative value so slight, that it was an abuse of discretion for the trial Court to admit it, over the repeated objections of defense counsel. The error permeates the entire trial and requires reversal of the conviction.

POINT II.

THE JUDGMENT MUST BE REVERSED BECAUSE THE CHARGE GIVEN BELOW ON THE CONSPIRACY COUNT AND THE FALSE PROSPECTUS COUNT (COUNTS 1 & 18), DID NOT ACCURATELY DEFINE THE OFFENSES CHARGED AND THEIR RESPECTIVE ELEMENTS.

The first count of the indictment charged a conspiracy to violate 15 U.S.C. §§ 77(q)(a), 77s(a), 77x and 17 CFR 230.56 and 240.10-6-5 (A. 11-16).* There were also substantive counts laid under each statute. The remaining substantive counts alleged mail and wire fraud (18 U.S.C. §§1341 and 1343). Count 1 did not charge violation of these sections as objectives of the conspiracy.

The charge on the law applicable to the case, rather than general instructions on credibility and the like, is contained in 13 pages (A. 95-108, 5489-5502). While its brevity is notable, we submit that it utterly failed to define the offenses charged in Counts 1 & 18, and that its giving was plain error.

The Court began by defining conspiracy (A. 95-99, 5489-

* 15 U.S.C. §§ 77q and 17 CFR 240.10-6-5 are fraud provisions and 77s and 17 CFR 230.56 relate to the necessary disclosures required in an offering circular. Section 77x makes "willful violations" of these sections a crime.

5493). As to the unlawful objectives alleged in the indictment as the objectives of the conspiracy, the Court stated:

> "They are claimed to be three fold. The two principal ones being violations of the securities laws of the United States and of its mail fraud statutes." (A. 98, 5492)*

The Court did not explain the particular statutes at this point, telling the jury "I'll have more to say about those statutes later . . . " (A. 98, 5492).

In the charge on the substantive counts, the Court never read the statutes involved or defined them, other than to state that if the jury found certain specified facts, then as a matter of law the crimes charged in the statutes had been committed. This kind of charge was held plain error in Morris v. United States, 156 F. 2d 525 (9th Cir., 1946) and United States v. Levy, 153 F. 2d 995 (3rd Cir., 1946); cf. Sandroff v. United States, 158 F. 2d 623, 630 (6th Cir., 1946), on the ground that by reserving the law to himself and merely instructing that it applies in a certain manner defined by him to sets of facts which the jury may or may not find, the court did not fullfill its duty to instruct on the law. We believe that the charge in the Morris case is indistinguishable from the charge given below, and that the case should be reversed on this basis alone. There are, however, otner serious errors in the charge which also require reversal.

As to the false prospectus count under §§ 77s and 77x,

* Mail fraud was not alleged as an objective of the conspiracy.

the Court never charged the jury that the omissions from the offering circular had to be willfully made and never defined the terms fraudulent and material. As to the counts of securities fraud under § 77q, the court never defined that crime at all, charging the jury instead on mail fraud.* We submit that these errors fatally infected the verdict both on the substantive count under §§ 77s and 77x, and on the conspiracy count, and require reversal of the judgment.

A. Count 18 - - The False Prospectus Count under 15 U.S.C. §§ 77s and 77x

Section 77s and Regulation 230.256 impose the duty on the issuer of the stocks to issue an offering circular containing certain information. Section 77x makes it criminal for any person to willfully violate any provisions of the chapter, any rule promulgated thereunder, or to willfully omit any material fact in a registration statement.

Assuming that a crime under Count 18 was proved,** when the court charged on the essential elements of that count, it totally omitted the element of willfullness from its definition of the offense. It charged that the offense was committed upon a finding that the various disclosures specified in the indictment had not been made and a finding that such disclosures would have been of material interest to the purchaser.***

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* The charge on Count 9, the wire fraud count, is discussed in Point III.

** This argument is made in the brief submitted by counsel for Vincent Aloi, and we adopt that argument under Rule 28(i).

*** The charge given on Count 18 was the following:

> "I advise you as a matter of law, if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of that prospectus would have violated the securities laws of the United States." (A. 101, 5495).

Where an act is not malum in se, but must be done with a particular state of mind, failure to instruct the jury as to the requisite knowledge or intent is plain error. United States v. Ausmeier, 152 F. 2d 349, 356-57 (2nd Cir., 1945); United States v. Byrd, 352 F. 2d 570, 572-74 (2nd Cir., 1965); United States v. Gillilan, 288 F. 2d 796 (2nd Cir., 1961). "There must be similar care in charging about willfulness." 2 Wright, Federal Practice & Procedure, § 487, p. 302-3;* United States v. Robertson, 298 F. 2d 739 (2nd Cir., 1962); United States v. Krosky, 418 F. 2d 65 (6th Cir., 1969).

The instruction in the Byrd case is virtually identical with this one. There, the court charged that if the jury found the defendant to be a United States employee, acting in connection with the revenue laws, who received a fee not prescribed by law for performance of a duty, then the defendant could be convicted, 352 F. 2d at 573-74. As in the case at Bar, there was no defense of lack of intent, but only a denial of the facts, 352 F. 2d at 574. The Court found plain error in the instruction, because "to sustain a conviction the Government had to prove and the jury had to find criminal intent," and hence "the court's failure to explain the relevance of criminal intent to other factors in the case and to describe it as one of the essential elements of the offense, requiring, as such, proof

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* As was held in Haver v. United States, 315 F. 2d 792 (4th Cir., 1963):

> "Congress having made willfulness an essential element of the offense, the courts cannot write it out. 'Willful' generally means intentional, knowing, or purposeful, as opposed to careless, thoughtless, heedless, or inadvertent . . .."

beyond a reasonable doubt, was tantamount to no instruction at all on the subject" 352 F. 2d at 574.

In Ausmeier, a conspiracy prosecution, the court failed to instruct that the substantive offense of filing under the Alien Registration Act a registration application containing statements known by him to be false, required knowledge of the falsity by the one making the misstatement. Although there was ample proof that the defendants made false statements (152 F. 2d at 355), as well as proof from which the jury could have concluded each defendant had the requisite knowledge (152 F. 2d at 357), the Court nevertheless reversed because the court never gave an instruction on the element of knowledge. The verdict could not stand:

> "Because there is altogether too much danger that the jury may not have understood that such knowledge was an essential element of guilt . . .." (152 F. 2d at 358)

In contrast to Ausmeier, in this case the evidence on willfulness was equivocal. There was no evidence that appellant had any knowledge that the offering circular was to be used in the scheme. Hellerman had told him he was going to sell the AYSL stock, first by bribing brokers, and then by having buy and sell confirmations made up showing a 2-point spread, to convince people to buy on the basis that they had a sure profit in the stock (see supra, pp. 8-9). Appellant's guilt was predicated solely on Pinkerton v. United States, 328 U.S. 640(1946). The willfulness at issue was that of the

co-conspirator Nelson, who created the offering circular. Nelson testified Hellerman was introduced to him as the head of an investment group to buy the unsold shares of AYSL (supra, p. 6). The jury could have believed that there was no reason to amend the prospectus because Hellerman was a purchaser, not an underwriter. Additionally, the Government's expert testified it was not uncommon for an underwriter to form a selling group and to share commissions with them (275). The jury could have found that Nelson believed this to be the situation in this case. If Nelson believed that Hellerman was not the underwriter, but only a large block purchaser or part of a selling group, then even if he were wrong, his failure to amend the offering circular was not willful.* Consequently, the case is even stronger than Ausmeier, where the court reversed even though "on the evidence, the jury, correctly instructed, could properly have concluded that each defendant had the requisite knowledge" (152 F. 2d at 357).

In United States v. Robertson, supra, 298 F. 2d at 742, the court reversed conviction on two counts under 15 U.S.C. § 77e because the charge did not include the element of willfulness, even though the sentences were concurrent

* Nelson also testified that although he did not specify in the circular that Tec-Ec would receive a fee, it did have a footnote about a $20,000 expenditure for miscellaneous expenses, which amount included that fee (2706-07). Once again, the evidence on his willfulness, in failing to make the disclosure specified in subsection (a) of Count 18 is equivocal.

with those on other counts which were affirmed. Here, the sentence on Count 18 is consecutive to that on the conspiracy count and the sentence on Count 9 is consecutive to both, hence reversal is clearly mandated.

In Kronsby, supra, 418 F. 2d at 66-69, a charge which did not adequately define the element of willfulness was held plain error, although some definition was given. In this case, no definition at all was given.

In this case, the court in its instruction on Count 18, converted § 77x from a statute permitting conviction of "any person who willfully violates any . . . promulgation of this chapter . . . or any person who willfully, in a registration statement . . . makes any untrue statement of a material fact . . .." into one permitting conviction without any proof of willfulness whatsoever. This allowed the jury to find derivitive guilt under the Pinkerton charge by merely deciding that Nelson had omitted material facts from the offering circular without then going on to determine whether such omissions were willful.

This failure to charge a material element of the crime not only vitiates the conviction on the substantive count, it also vitiates the conspiracy count conviction, since this substantive violation was charged as one of the objects of the conspiracy. United States v. Ausmeier, supra; United States v. Yasbin, 159 F. 2d 705 (3rd Cir., 1947).

The court's charge on Count 18 was also plain error in another respect - it constituted a material variance from the crime charged in the indictment, by construing that count to

allege that the prospectus was "false and misleading in that it failed to disclose . . . that Hellerman was involved in the deal and that some $45,000 would be siphoned off . . . to the defendants . . . " (A. 101, 5495).

Under this charge, if the jury believed that Hellerman was involved in the deal in any capacity, even as a purchaser and seller in the after-market manipulation, then the failure to disclose that involvement rendered the prospectus false and misleading. However, this was not the crime charged in the indictment. Under Count 18, paragraph (c), the omission of Hellerman's name from the prospectus was fraudulent and material only if Hellerman was an undisclosed underwriter "as that term is defined in Section 2(11) of the Securities Act of 1933." It was willful only if Nelson believed he was an underwriter and concealed that fact. The indictment did not allege that concealment that Hellerman was somehow involved in the deal at any stage after the offering constituted the crime.

The charge was further deficient because the court gave no definition of the terms fraudulent and material and undisclosed underwriter, and hence failed to give the jury any legal standards by which to determine whether any one of the four omissions from the prospectus alleged in the indictment was fraudulent and material, within the meaning of the statute, and whether Hellerman was an undisclosed underwriter within the meaning of 15 US..C. § 77b.

There must be some explanation of the meaning of terms

used in a statute especially where the terms have specific legal meaning but have broad content in everyday use. Where the court's charge contains no such definition, it "creates a situation in which jurors, lacking guidance, may have attributed to the words a connotation not legally acceptable" Mitchell v. United States, 394 F. 2d 767, 769 (D.C. Cir., 1962). This was an acute danger here, because the terms "fraudulent" and "material" had specific meaning in the context of the securities statues (Brenner, "Instructions in SEC Criminal Cases", 41 F.R.D. 93, at 111-13 [1967]), but in everyday parlance had a much broader and more indefinite meaning, and because the term undisclosed underwriter was entirely a term of art.

Under the charge as given on Count 18, the jury was permitted not only to find guilt without finding the element of willfulness, and without having been given a definition of the terms fraudulent, material and undisclosed underwriter, in the context of the securities law, but it was also permitted to find that the alleged omissions from the prospectus were false and misleading in a respect not charged in the indictment. Cf. Stirone v. United States, supra, 361 U.S. at 215-16.

B. The Failure to Define the Substantive Offense Laid Under § 77q, Charged as an Object of the Conspiracy.

On Counts 2-8, the securities fraud counts, the court charged:

> "They allege that on certain specified dates, certain confirmations of purchases were

placed in the mail in pursuance of this conspiracy.

> "The counts also alleged that such mailing constituted the crime of mail fraud in that the mailing was done in pursuance of a scheme to defraud." (emphasis added) (A101-2,5495-6)

The indictment did not charge these counts as mail fraud, but as stock fraud under § 77q. The court never defined that crime, even though it was charged in count one as an objective of the conspiracy.

The court compounded the error by instructing that the jury could find guilt under these counts on the following basis:

> "I advise you as a matter of law that if you find that these confirmations were in fact placed in the mail and that they were in fact placed there as part of a scheme to perpetrate the fraud on the public which is alleged in the indictment, such use for that purpose would constitute a crime against the United States." (A. 102, 5496)

The court further confused the issue by its charge on the actual mail fraud counts (Counts 13-17). Acknowledging that they were framed under different statutes, the court, nonethe-less stated:

> "However, you did not come here for a lecture on United States statutory law and I advise you the difference in verbiage is without significance to you. The essential questions in both sets of counts are the same, were the mailings made. Were they deliberately made pursuant to the scheme to defraud alleged in the indictment, and were they within the reasonable contemplation of the perpetrators of that scheme?" (A. 105, 5499)

The essential elements of the crime of fraudulent interstate transportation in the sale of securities are that 1) a scheme involving false statements of material fact was em-

ployed to defraud investors; 2) that the violation was willful; 3) that some instrumentality of interstate transportation was used. Brenner, "Instructions in SEC Criminal Cases," 41 F.R.D. supra, at 113-115. The charge given on this offense did not define any of the elements of this crime, including the element of willfulness.

The essential question under § 77q is not whether the mailing was deliberately made pursuant to a scheme to defraud, as the court charged (A. 105, 5499), but whether the defendants themselves or vicariously, under the Pinkerton theory, participated in a scheme to defraud in which false or misleading statements were intentionally and willfully made for the purpose of defrauding investors.

In any criminal case, the "discharge of the jury's responsibility . . . depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria" United States v. Clark, 475 F. 2d 240, 250 (2nd Cir., 1973). In this case, it was plain error to submit the case to the jury not on the offense charged in the indictment, but upon the definition of another offense. In Polansky v. United States, 332 F. 2d 233 (1st Cir., 1964), the court did not charge one of three statutes laid as the object of the conspiracy. Instead it charged that the object was another statute, upon which an acquittal had been granted. The court found plain error and reversed because that section was improperly before the jury "and may have caused them to bring

in an improper verdict, i.e., a conviction for an offense not charged in the indictment" 332 F. 2d at 236.

Though the jury acquitted of the substantive counts laid under § 77q, the error cannot be disregarded because the conspiracy count charged violation of this statute as an objective, and the court was thereby obliged "to instruct [the jury] as to the elements of the substantive offense involved in the conspiracy" United States v. Yasbin, supra, 159 F. 2d at 705.

C. The Charge on the Conspiracy Count

The court began the charge by defining conspiracy. The portion of that charge quoted below* is fatally defective in a number of respects.

As was stated above, the unlawful objectives alleged in the indictment did not include mail fraud which the court charged as being an objective of the conspiracy. This was error because the court must charge only the crime set out in the indictment. The indictment can be broadened only by amendment by the grand jury, and not by an instruction to the jury. United

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* "So, the first question that confronts you is, whether these defendants or any of them consciously and intentionally became parties to a common enterprise to accomplish an unlawful objective, the unlawful objective set forth in the indictment.

"What then are the unlawful objectives?

"They are claimed to be threefold. The two principal ones being violation of the securities laws of the United States and of its mail fraud statutes.

[footnote continued on following page]

States v. Stirone, supra, 361 U.S. 212; United States v. Polansky, supra.

Moreover, under this braod language, which was never given content by a reading or correct explanation of the statutes alleged as objectives of the conspiracy, the jury was entitled to find that knowledge of any criminal purpose, not only those alleged in the indictment as objectives, was sufficient to justify conviction on the conspiracy count. "A verdict on such a basis would have been improper" United States v. Gallishaw, 428 F. 2d 760 (2nd Cir., 1970).

To convict the appellant for the conspiracy charged in the indictment, the jury would have to find that he had knowledge either that the use of an offering circular which willfully made material omissions of fact in the sale of securities was contemplated (§§ 77s & 77x), or that a fraudulent device etc., would be employed in the offer or sale of securities, to be sold or offered by means of the instrumentalities of interstate commerce (§ 77q).

Since the jury was never instructed on the crime as defined in § 77q(a), and never told the legal definition of the

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[Footnote continued from prior page]

> "I'll have more to say about those statutes later but I advise you as a matter of law that the objectives of this conspiracy as described by the government, namely, obtaining moneys from the public by fradulently pumping worthless securities into the ordinary channels of commerce could not be accomplished without violating the above mentioned statutes and you would be entitled to conclude that any defendant whom you find to have intended such objectives, must have contemplated the violation of those statutes." (A. 98, 5492)

terms fraudulent and material, the jury had no legal standard by which to determine which conduct proved at trial was interdicted by § 77q(a).

Under this broad charge, the jury could have convicted on the conspiracy count by finding that the fraud consisted of selling worthless securities to the public (which these admittedly were), even though the selling of worthless securities did not constitute a fraud under the statute because the offering circular made full disclosure of the extensive corporate debts and miniscule assets*.

Since the jury was not charged that the omissions from the offering circular were willfully made, it could have convicted on the conspiracy count by finding only that Nelson (hence, the appellant via Pinkerton), made omissions and that they were false and material. This is improper because "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself" Ingram v. United States, 360 U.S. 672, 672 (1959); United States v. Ausmeier, supra, 152 F. 2d at 356.

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* The offering circular stated that the offering involved special rights and immediate substantial dilution to public investors (A. 46). As the circular explained, the shares held by Graifer and his partners represented an asset value of minus $ .46 a share, where as the public was paying $ 3 for the same share (A. 49). Nelson had characterized the offering as "pretty bad" and Dragani had told Graifer that the company was so badly in the red that the issue was "a piece of garbage" (419).

As we argue in Point I, supra, the all encompassing nature of this part of the charge also permitted the jury to find that appellant had knowledge of and intended the violation of the statutes charged in this indictment, if they believed that he associated himself with Hellerman in 1969, in an on-going scheme to obtain moneys from the public by fraudulently pumping worthless securities into the channels of commerce. A verdict on this basis is totally improper, because in order to be guilty of the conspiracy charged in the indictment, "the defendant . . . had to know what kind of criminal conduct was in fact contemplated." United States v. Gallishaw, supra, 428 F. 2d at 736, n. 1.

Since the trial judge believed that appellant's guilt in this case could be established by finding that appellant associated himself with Hellerman in a conspiracy to raid the public whether or not he knew what was going on in AYSL, it is not inconceivable that jurors came to this same conclusion, especially because the court believed "the jury will infer that from what I say in general about conspiracy law" (4329-30).

Another vice of the broad language of this portion of the charge is that the jury was never advised on the kind of commerce which had to be contemplated to render a fraudulent scheme relating to stock a federal crime. The jury was merely told that the conspirators had to contemplate that the worthless securities would be "fraudulently pumped into the ordinary channels of commerce" (A. 98, 5492). No statement was made

that the use of instrumentalities of interstate commerce had to be contemplated in the sale of the stock. While proof of knowledge of the factual elements conferring federal jurisdiction is not required to convict under the substantive count, proof of such scienter should nevertheless be required to convict of conspiracy and failure to so charge is plain error. Cf. United States v. Alsondo, 486 F. 2d 1339 (2nd Cir., 1973), and cases cited therein.

In summary, conviction cannot rest on an equivocal direction to the jury on a basic issue. Bollenbach v. United States, 326 U.S. 607 (1945). Nor should the jury be permitted to "speculate on what crime is being submitted to them to resolve, or what the contents of each such crime might be." Williamson v. United States, 332 F. 2d 123, 133-34 (5th Cir., 1964). The court's charge on counts 1 and 18 fell afoul of these legal principles in nearly every respect, and the judgment on these counts must be reversed.

POINT III.

THE GOVERNMENT FAILED TO PROVE THAT THE USE OF WIRES ALLEGED IN COUNT 9 WAS "FOR THE PURPOSE OF EXECUTING" THE SCHEME TO DEFRAUD. ADDITIONALLY, THE COURT ERRONEOUSLY CHARGED THAT GUILT DEPENDED UPON A DETERMINATION THAT THE CALL WAS A MEANS BY WHICH THE CONSPIRACY, NOT THE FRAUDULENT SCHEME, WAS CARRIED INTO EFFECT.

To sustain the conviction for wire fraud under Count 9, the proof had to establish 1) that a scheme to defraud by means of false representations was devised, and 2) that wire communications were made "for the purpose of executing such scheme . . .." 18 U.S.C. § 1343; United States v. Marino, 421 F. 2d 640, 641 (2nd Cir., 1970); United States v. Maze, 38 L. Ed. 2d 603, 608, 611 (1974).*

In this case, the Government proved that Hellerman spoke to Graifer and Lombardo about doing the AYSL deal at the Riverboard Restaurant. As the Government stated in its opening, in order to arrange the deal, the "powers behind the scheme had to speak to one another to confirm, to agree on the terms, the terms under which Hellerman would do the deal . . ." (156). The Government stated:

> "The evidence will show that this telephone call, this arrangement of the two men behind the scenes talking to each other to confirm and guarantee that the men out front

* While the Maze case arose under § 1341 (the mail fraud statute), the two statutes are identical and have been interpreted by the courts as having identical elements. See, for example, United States v. Houlihan, 332 F. 2d 8, 13-14 (2nd Cir., 1964); United States v. Guterma, 179 F. Supp. 420, 428 (E.D.N.Y., 1959).

would do the job, was how these men entered into contracts with each other." (157)

This is all that the evidence established - - that the phone call alleged in Count 9, was the call by which the initial conspiracy excluding Vincent Aloi and Savino, was formed. (See supra, pp. 4 and 8; and Government's summation, 5421-23).

We submit there was a failure of proof on this count, and it should have been dismissed. Section 1343 does not make criminal the use of the wires by co-conspirators for the purpose of concocting a conspiracy. The criminal conduct proscribed by the statute consists of formulating the scheme to defraud and then using the wires for the purpose of executing that scheme.

There is no reported case under 18 U.S.C. §§ 1343 or 1341 which holds that there can be a conviction under those statutes upon proof that use of the wires or mails alleged was for the purpose of formulating a conspiracy to defraud. The one case in point, United States v. Ryan, 123 F. 634, 636 (E.D. Ark., 1903) holds that an allegation that "the defendants used the mails for the purpose of concocting the schemes to defraud, but not for the purpose of carrying them into effect" is not sufficient to bring the acts within the meaning of the mail fraud statute.

Additionally, the cases interpreting the requirement of use of the mails or wires "for the purpose of executing the scheme" all support the result in the Ryan case and our contention that the call alleged in Count 9 was not a use of the wires to defraud within the purview of that statute.

In United States v. Guterma, supra, 179 F. Supp. 420,* the Government alleged that the annual report of a company was

mailed to shareholders for the purpose of executing a scheme to defraud. This mailing occurred after certain stocks had been purchased and did not reflect the true facts of that purchase (179 F. Supp. at 428). The court dismissed these counts on the ground that the mailing was not for the purpose of executing the fraudulent scheme. It held that the mailings were not to victims of the scheme, "in the sense that they had been subjects of previous soliciation" and though the recipients of the report were ultimately to become the victims, "the assumed misrepresentations to them were not made as bait or lure to induce them to become shareholders . . .." 179 F. Supp. at 428. The court held that unless the communications serve this purpose or were in continuation of the fraud, or in aid of retention of the fruits of the fraud or to lull the victims into postponing action with respect to his loss, then the use of the communication cannot be deemed one "for the purpose of executing" the fraudulent scheme. 179 F. Supp. at 429

Thus, under the single case cited by the Government below as authority for its position that the call between appellant and Buster Aloi to enter into the conspiracy constituted wire fraud, the count should have been dismissed.

The other authority construing the phrase "for the purpose of executing such scheme" confirms the court's construction of that phrase in Guterma.

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* Which was the case relied on by the Government below on this point, in its trial memorandum:

> "Furthermore, the making of interstate telephone calls in furtherance of the fraudulent offer constitute [sic] violations of the wire fraud statute. 18 U.S.C. § 1343. Counts 9-12. See United States v. Guterma [cite omitted]." (Gov't. Memorandum, p. 6)

The term "for the purpose of executing" a scheme to defraud has been held to encompass communications to attract customers, even though no false representations or requests for money were made in them, e.g., Milan v. United States, 322 F. 2d 104, 109 (5th Cir., 1963). It also encompasses a communication which is a step in the scheme to defraud, such as a call to a victim attempting to entice him into the scheme, even though it is unsuccessful, e.g., Huff v. United States, 301 F. 2d 760 (5th Cir., 1962). As well, it encompasses communications enabling the defendant to acquire dominion over the money to be defrauded, e.g., Pereira v. United States, 347 U.S. 1 (1954), as interpreted in United States v. Maze, supra, 38 L.Ed. 2d at 609. No case has construed the term "for the purpose of executing" the scheme to encompass the kind of phone call charged in Count 9. Moreover, several cases which involve communications occurring before the scheme is devised have concluded that such communications are not "for the purpose of executing" the sceme, even though the scheme could not have taken place without these communications.

In United States v. Buckner, 108 F. 2d 921 (2nd Cir., 1940), cert. denied, 309 U.S. 669, the court dismissed two mail fraud counts on the ground that these communications were not for the purpose of executing the fraudulent scheme. The counts covered solicitation letters sent to bond holders before any fraud was commmited, and the court held:

> "If a conviction on a given count is to stand, it is not enough that there was evidence of a scheme to defraud. It must also be shown that the mails were used as part

> of the fraudulent scheme, and as to each letter relied upon, that the particular letter was not sent out until after a scheme to defraud has been born. Hass v. United States, 8 Cir., 93 F. 2d 427."*

The reasoning in Buckner was subsequently followed in United States v. Beall, 126 F. Supp. 363 (N.D. Cal., 1954), where the defendant was charged with embezzling funds sent to him in the capacity of treasurer of a charity. The court reasoned that since mailings after the scheme is complete do not allege a crime, then it follows that "the reverse side of the coin" does not charge a crime, because:

> "The use of the mails before beginning a scheme to defraud is not a use for the purpose of executing the scheme, any more than is the use of the mails after a scheme to defraud has been completed." 126 F. Supp. at 365

This case was tried on the theory that the phone call alleged as wire fraud in Count 9, was between alleged conspirators solely for the purpose of formulating the conspiracy, not for the purpose of executing an already existing scheme to defraud banks, brokerage hours and purchasers. By the Government's own admission in opening and summation, the scheme was not in existence when the phone call was made because that call was how the scheme was born. Hellerman testified that neither he, Lombardo nor Graifer had authority to agree on any terms or to do the deal (supra, p. 8). Under the authority of the

* Hass v. United States, supra, also held "unless the scheme to defraud existed prior to the dates of the mailings . . . [they] do not constitute a misuse of the mails." See also, Gammon v. United States 12 F. 2d 226, 228 (8th Cir., 1926).

Buckner case, the evidence in this case should be held insufficient to establish that the telephone call in Count 9 constituted wire fraud, and the count should be dismissed.

Additionally, the court, in its charge on Count 9, equated the elements necessary for a finding of guilt on Count 9 with those necessary under Pinkerton for a finding of guilt by virtue of membership in the conspiracy. It charged:

> "Therefore, as to this act, you may find guilty only the defendants Dioguardi and Lombardo.
>
> "And then of course, only if you have already found them guilty of the original conspiracy and have found that this call was one of the means by which that conspiracy was carried into effect." (A. 107, 5501)

This was a direction to convict on Count 9 upon a finding that the conspiracy was in existence, and the call was for the purpose of carrying the conspiracy into effect; not upon the required findings that "(1) the defendants devised a scheme to defraud . . . by means of false representations; (2) that they caused the communications listed in the indictment to be sent in interstate . . . commerce for the purpose of executing the fraudulent scheme; and (3) they acted as part of an illegal conspiracy." United States v. Whiting, 308 F. 2d 537, 540 (2nd Cir., 1962). Although there was no exception to the charge on this ground, it constituted plain error because it failed to define the elements of the offense charged. See cases cited, Point II.

POINT IV.

THE PROSECUTOR IMPROPERLY VOUCHED FOR THE CREDIBILITY OF THE MAJOR WITNESS AGAINST APPELLANT, AND THE ERROR CANNOT BE DISREGARDED AS HARMLESS.

The extent of the consideration given to Michael Hellerman to induce him to testify was extraordinary. Hellerman was the lynch-pin of some 20 swindles, involving millions of dollars. After he made his deal with the Government, he served only nine months in custody, although by his own admission he could have gone to jail for life if convicted of only three of the frauds and sentenced consecutively. Hellerman continued to commit stock swindles after becoming a Government informer, because, as he put it, "I thought I could get away with giving information to the government and making money on the side" (2377).

Although Hellerman admitted he made over a million dollars in the swindles, he was obligated to make restitution for only one tenth of that amount. No provision was made for repayment of back taxes on about a half a million dollars owing on the part of the proceeds actually reported. The Government accepted at face value Hellerman's representation that he was broke. It did not bother to levy on one of his safe deposit boxes until two years after he became a Government informant, did not determine whether he had other such boxes,* and permitted him to travel to Switzerland before he surrendered.

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* See the brief for appellant Lombardo, which contains extensive argument on the safety deposit box issue and which we incorporate by reference under Rule 28(i), FRAP.

Hellerman was known among his fellow thieves as a cheat, a liar, and a swindler. He had no compunction about cheating, stealing, and bribing, implicating his own family in his criminal affairs, or trading on the name of his dead father in order to make a buck.*

Hellerman was a witness who had every motive in the book to lie. "It bears against a witness' credibility, that he is an accomplice in the crime charged and testifies for the prosecution." IIIA Wigmore, on Evidence, § 967, p. 814. Hellerman was an accomplice. "So, too, the existence of a promise [of leniency] . . . for his share as accomplice in the crime charged." Ibid. Hellerman had not only one promise but 19 more to boot. "A witness' possible financial stake in the outcome of a case is highly relevant." United States v. Reed, 437 F. 2d 57, 59 (2nd Cir., 1971). Hellerman had an agreement under which the Government, in affect, agreed to overlook $900,000 in loot** and all back taxes owing, if he

* One of the Hellerman swindles was a memorial dinner held in memory of his father. The upshot of this was that Hellerman "stiffed" the Americana Hotel out of $10,000, blaming unpaid bills on appellant's friends, and false claimed to have donated the proceeds of the affair to charity. An offer of proof was made on this incident, but the trial court rejected it as collateral (3651-53).

** Hellerman, of course, claimed that he didn't get to keep this money, because appellant took it from him. This story not only kept his associates from pushing him for money while the deals were going on, but it was the perfect vehicle to convince the Government that it should look to appellant, not Hellerman, for the proceeds of the crimes. This gave him an enormous motive to portray appellant as his rapacious silent partner, who took every penny he made.

testified when called upon to do so.

In short, there was not one thing about Michael Hellerman which would commend him as truthful to a jury. He had lied in the past whenever it suited his purposes. His agreement with the Government permitted him to save his skin and his fortune, and to have no fear of retribution from any defendant as he would be transformed into a new person (in name if not essential quality) after the trials.

The danger presented by this kind of witness is readily apparent to any prosecutor. The defendants were prosecuted, and Hellerman who might, as easily have been pic'ed as a defendnat, was given a slap on the wrist. Winter got a suspended sentence and was still practicing law. Kelsey got a suspended sentence. Graifer made his deal and could look forward to no worse. As one trial lawyer has aptly observed about this kind of situation:

> "The testimony of the principal government witnesses was motivated in part to serve their own skins and help themselves. By satisfying the Government's theory of the crimes, they had escaped indictment themselves. By skillful cross-examination and appropriate arguments in summation, the defense attorney can insure that the jury views such co-conspirators as men who will say anything to save themselves." Rothblatt, "The Defense Notebook," N.Y.L.J. Ap. 30, 1974, at p. 3, col. 3

In order to salvage Hellerman, the Government took a tack at the trial below which should not be sanctioned by this Court. The Government was permitted to argue in summation that under Hellerman's agreement with the Government, "he was obli-

gated to testify truthfully* before grand juries and trial juries like yourself and I believe under cross-examination, Mr. Goldberg elicited the fact at some four trials, four other trials" (5391); and that Hellerman's agreement with the Government "is a conditional agreement. It is conditioned on Michael Hellerman testifying truthfully when he is called as a witness in connection with the case" (5995).

The Government further stated:

> "If Michael Hellerman violates that agreement, if he either testifies falsely or commits any other crime, Michael Hellerman is and will be prosecuted under the terms of this arrangement." (5395)

There was objection by defense counsel and the trial court merely stated, "you can't say will be" (5395). A motion for a mistrial was also made on this basis and denied (5455-56).

Any witness who takes the stand is obligated, by virtue of the oath he takes, to testify truthfully. Since Hellerman was sworn, no special agreement with him was necessary to secure truthful testimony. Moreover, because "the dignity of the United States Government will not permit the conviction of any person on tainted testimony," the Government is under an obligation not to call any witness whose testimony cannot be believed. Mesarosh v. United States, 352 U.S. 1, 9 (1956).

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* The prosecutor had been permitted to ask Hellerman whether the agreement was dependent upon Hellerman's "testifying truthfully as a witness in this case involving criminal activities", over defense objection (1709-10).

Because of this, it was totally unnecessary for the Government to expressly condition the immunity bargain with Hellerman upon the receipt of truthful testimony. Not only was it unnecessary, it was also totally improper. The only function served by this provision of the agreement was to permit the Government to overcome the natural inferences of bias flowing from the inducements to Hellerman by arguing, as the prosecutor in this case argued, that Hellerman could be believed because he had a contract with the Government to tell the truth.

The Government cannot vouch for the credibility of its witnesses or place its authority behind their testimony by conveying to the jury a belief the witness is telling the truth. United States v. Grunberger, 431 F. 2d 1065, 1068 (2nd Cir., 1970); Patriarca v. United States, 402 F. 2d 314 (1st Cir., 1968). Once the Government places before the jury the fact that the witness has been called only after he has made a contract with the Government to give truthful testimony, this implies that the witness has a special claim to veracity different from all other witnesses who take the oath. It conveys to the jury the fact that the Government believes it has assured the veracity of the testimony by the terms of the contract.

We submit that the prosecutor's argument in summation was totally improper, and that the error was of sufficient magnitude to require reversal of the conviction. Hellerman's testimony had to be believed for the jury to return a verdict

of guilty. In order to believe his testimony, the jury had to be convinced that Hellerman was not a man, who "by satisfying the Government's theory of the crime . . . had escaped indictment . . . [and] who will say anything to save [him]self." "The Defense Notebook", supra. The prosecutor's argument that Hellerman was obligated to testify truthfully because of his agreement with the Government improperly threw onto the scales the weight of the Government's belief in Hellerman's credibility, and this improper vouchsafing cannot be disregarded as harmless error.

POINT V.

THE GOVERNMENT'S FAILURE TO OBEY THE COURT'S DIRECTIONS OR TO ANSWER APPELLANT'S REQUESTS CONCERNING ELECTRONIC SURVEILLANCE REQUIRES REMAND.

The record in this case presents to the Court another examples of a "cavalier, carefree and careless attitude towards the conducting of electronic surveillance" by the prosecutors in this Circuit. United States v. Huss, 482 F. 2d 38, 52 (2nd Cir., 1973).

Appellant and co-defendants made timely demands prior to and during trial for disclosure of whether the Government had engaged in electronic surveillance of their premises or conversations.* To date the Government has not adequately re-

* 1950-54, 2073-73a, 2607-08, 3536-37, 4537-40, 4554-56.

sponded to these demands for disclosure.*

At trial appellant moved for disclosure of electronic surveillance after Hellerman testified to having conversations over appellant's telephone with appellant, Lombardo and Vincent Aloi (1951-53). These conversations involved the distribution of the proceeds of the alleged fraud and were crucial in implicating all defendants in the conspiracy (1868, 1869-70, 1871, 1873, 1888). Had there been a telephone tap on appellant's phone, the contents of these wiretaps might have provided exculpatory evidence by indicating that no such conversations took place or that conversations different than those testified to by Hellerman took place.**

It was not fanciful for appellant to believe that his phone and the phones of co-defendants were wiretapped. Schreiber stated that there were wiretaps of appellant's phone but not related to this case (1951).*** Moreover, Goldberg stated that Wing, McGuire or Lowe had told him that Hogan's office had

* A defendant is entitled to know whether or not the Government "unlawfully overheard conversations of . . . himself or conversations occurring on his premises, whether or not he was present or participated in those conversations" Alderman v. United States, 394 U.S. 179 (1969); 18 U.S.C. § 3504; 18 U.S.C. § 2512. Moreover, the Government must disclose whether or not any warranted surveillance was employed, so that the lawfulness of such surveillance can be tested against the strict requirements of 18 U.S.C. § 2510, et seq. And even if such surveillance is found to be legal a defendant is entitled to know the contents of such surveillance as such contents might be exculpatory or contain his own statements. Brady v. Maryland, 373 U.S. 83 (1963); Fed. R. Crim. P. 16(a)(1).

** That such conversations may not have taken place over the appellant's phone is given credence by Hellerman's testimony that appellant told people not to use his phone because "it may be bad" (1771). See also, 2393-95.

*** Assistant U.S. Attorney Wing, also, stated that there were some earlier wiretaps of appellant's phone (5354-56).

engaged in wiretapping of appellant's phone (1953, 2073, 4539). Finally, reports of the extensive wiretapping of so-called organized crime figures by the federal-state Joint Organized Crime Strike Force and by the federal and state prosecutors are a frequent occurrence.*

Schreiber's response to appellant's requests for the disclosure of wiretapping was that such an inquiry was "an arduous procedure" (1951). Despite this protestation by Schreiber, the court ordered that such an inquiry be made of:

> "any telephone conversations you mention coming out of Dioguardi's office, or any other wire that the Government knows to be tapped." (1953)

Additionally, the court ordered Schreiber to determine whether there were any State wiretaps, and ordered him to check with Wing, Lowe and McGuire to determine if they had knowledge of any wiretaps from previous trials in which appellant and the co-defendants were involved (1953-54).**

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* Assistant United States Attorney Wing stated that the New York City Police in conjunction with the Federal Strike Froce had wiretapped certain of the defendants in Imperial (5355).

The New York Times of May 2, 1974 recently reported the indictment of 117 people linked to the "five crime families" and stated that 63 wired rooms were monitored under court authorized wiretaps, The New York Times, 1, 58, Col. 3-4 (May 2, 1974). The majority of these wiretaps were aimed at the Colombo Family in which Vincent Aloi was allegedly a high figure.

Additionally, the Times reported that police had placed an eavesdropping device in the Nyack apartment where Vincent Aloi allegedly visited and which visit Aloi supposedly lied about to a New York Grand Jury, New York Times, 39 (May 3, 1972).

** These three prosecutors were involved with many of the same appellants in the Belmont and Imperial prosecutions.

As all too frequently occurs,* the prosecution has yet to come forward with adequate answers to appellants' requests and the court's order mandating disclosure of electronic surveillance.

Some three and one half weeks after the court ordered an inquiry, Schreiber could only give the court the "informal" oral answer that "Mr. Frank Short [another Assistant U.S. Attorney] had told me there is nothing [from the F.B.I.] on any of the defendants" (4537-38).**

Wing stated that in the Imperial case he had related "whatever wiretapping information we had about any of the defendants in that case and there was some reference made to some wiretapping involving Dioguardi which to the best of my memory occurred back in the middle 1960's . . .." (5355). And, also, that certain defendants in Imperial had been wiretapped by the Joint Strike Force (5355).

Finally, Schreiber attempted to bolster his inadequate representation of the extent of wiretapping by stating he ran

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* E.g., United States v. Smilow, 472 F. 2d 1193 (2nd Cir., 1973) (Disclosure of wiretap in Supreme Court); United States v. Cook, 432 F. 2d 1093 (7th Cir., 1970), cert. denied, 401 U.S. 1966 (1971).

** On November 20, 1973, the Government stated that they had contacted the F.B.I. about the existence of wiretapping (2073). On November 28, 1973, appellants renewed their request and Schreiber again stated that the F.B.I. had been contacted (2607-08). On December 6, 1973, the Government still had not received the report back from the F.B.I. and indicated, contrary to Schreiber's statements, that they had only recently telexed the Department of Justice and phoned the F.B.I. in Washington and New York (3536).

"a good part of the investigation" and was not "aware of any wiretaps on any of the defendants nor any information derived from any wiretap" (4540).

In no case found by counsel have such hearsay representations by the prosecution as to the extent of wiretapping been found adequate. See, e.g., United States v. Alter, 482 F. 2d 1016, 1027 (9th Cir., 1973). Particularly in this case, where the likelihood of electronic surveillance is practically a given, a remand is required for a full exploration of the extent of any electronic surveillance.

When measured against the cases decided in the area, numerous and glaring inadequacies appear in the representations of the prosecution:

(1) Schreiber's self-serving statement that he personally did not know of any wiretaps is meaningless. A prosecutor's lack of knowledge of surveillance is irrelevant.* O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966); Benati v. United States, 355 U.S. 96, 99 (1957); United States v. Seale, 461 F. 2d 345 (7th Cir., 1972).

The reason is obvious. The F.B.I. frequently conceals the source of its information even from its own agents, much less the United States Attorney. As stated in United States v. Schipani, 289 F. Supp. 43, 50 (E.D.N.Y., 1968), aff'd. 414 F.

* Moreover, a prosecutor is held to have the knowledge of other prosecutors in his office. Giglio v. United States, 405 U.S. 150 (1972).

2d 1262 (2nd Cir., 1969), cert. denied, 397 U.S. 922 (1970):*

> " . . . various agents . . . testified that they were unaware of [electronic] surveillance . . .. Thus, [agent] Wilens, upon being shown an FBI report based in part upon electronic surveillance, testified that he would not be able to tell whether any particular entry in the report was derived from this method of surveillance and that he might make such information available to another agency without being aware of its source." (289 F. Supp. at 50)

It is not improbable that leads to certain evidence and witnesses came about through electronic surveillance which may have been unknown to the prosecutors. Only an adequate inquiry with the proper federal and state agencies would turn up such surveillance.

(2) The prosecution's representations do not unequivocally affirm or deny surveillance as to all telephones of appellants for which they have standing, nor does it state the time periods checked. In fact, Schreiber does not indicate that any particular telephones were checked. An adequate denial of surveillance must so indicate. United States v. Alter, supra. United States v. Doe [Stavins], E.B.D. No. 71-201 (D. Mass., Jan. 20, 1972).

(3) Because of the Government's sordid history of non-disclosure of electronic surveillance all courts now require that denials of such surveillance be made by affidavit indicat-

* In United States v. Coplon, 185 F. 2d 629, 639 (2nd Cir., 1950), cert. denied, 342 U.S. 920 (1952), the Court referred to evidence that the words "confidential informant" may be used in FBI files to disguise an illegal surveillance.

ing the nature of the inquiry made to discover surveillance records; by whom such inquiries were made; the agencies inquired of; the names, telephone numbers, and dates of the checks, and the date of the inquiry. E.g., United States v. Alter, supra; Korman v. United States, 486 F. 2d 926 (7th Cir., 1973); In re Grumbles, 453 F. 2d 119 (3rd Cir., 1971); United States v. Menz, Crim. No. 2144 (D. Del).

None of this was done in the instant case.

(4) The most that can be stated regarding Schreiber's oral, unsworn, hearsay statement is that it indicates someone else checked with one federal agency, the F.B.I., about the wiretapping of unspecified phones during an undetermined period of time. Yet numerous other federal agencies employ wiretapping and the courts require that these agencies be checked. Korman v. United States, supra; In re Tierney, 465 F. 2d 806 (5th Cir., 1972), cert. denied, 410 U.S. 912 (1973).

Recent government authorities have stated that inquiries were made of the Bureau of Narcotics and Dangerous Drugs, the Bureau of Alcohol, Tobacco and Firearms, Internal Revenue Service, Bureau of Customs, United States Secret Service and the United States Postal Service. If it is the government's belief that appellants are members of organized crime, it seems likely that one or more of these agencies may have been engaged in wiretapping.

(5) The prosecution failed to check for wiretaps with either the Joint Strike Force or Hogan's office. Elkins v.

United States, 364 U.S. 206 (1960) prohibits the federal government from using any evidence illegally seized by the State, and obviously any wiretaps engaged in jointly by federal and state officials must be disclosed.

Although a federal prosecutor may not need to check with State in all situations, in this case the prosecution admitted it had the knowledge that Hogan was wiretapping appellant and co-defendants. Once such knowledge was admitted, the prosecution had the burden of disclosing such wiretapping to appellant and co-defendants and proving that no leads or evidence was derived therefrom.* Moreover, as the prosecution knew Hogan had wiretaps of appellant and co-defendants, they had an obligation to determine if such wiretaps were exculpatory and to turn them over upon request.

The failure of the prosecution to inquire as to whether the Joint Strike Force was wiretapping is inexcusable. It is likely that many of the leads which eventually led to this prosecution came from wiretapping done by that agency and that this fact was never disclosed to the prosecutors.

(6) The Government's attempt to rely on the Bill of Particulars furnished to counsel on Imperial is absurd.

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* As stated in Murphy v. Waterfront Commission of New York, 378 U.S. 52, 103 (1964): "As in the analogous search and seizure and wiretap cases - - where the burden of proof is on the government once the defendant establishes the unlawful wiretap - - once a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the government can be put to show that its evidence is not tainted . . .."

Wing testified that he loaned the Bill of Particulars to another assistant and didn't "recall who it was" (5354). While some of the counsel in this case participated in Imperial, many did not. These counsel never even saw that Bill of Particulars.

But even more foolish is the prosecutor's effort to employ the answer given in a different case as the response to the disclosure requested in this case. The alleged conspiracy in Imperial ended sometime in Feb., 1970, prior to the time the alleged conspiracy in this case was begun. The Imperial trial itself occurred a year before this one and no post-trial surveillance could possibly be included. Thus, much of the wiretapping relevant to this case could not have been disclosed in Imperial.

Moreover, the Bill of Particulars is not in affidavit form, does not state the telephone numbers checked, the agencies inquired of, the dates of the inquiry. The Bill of Particulars only says that "the Government has no knowledge of any eavesdropping by wire interception, electronic or other electronic device, or human being, used by the Government in its pre-charge or pre-indictment investigation." In other words, it does not unequivocally affirm* or deny wiretapping, but says that none of its evidence is tainted. This conclusion is for the courts and not for the Government. The Government's obli-

* The Bill of Particulars states that appellant was overheard in 1964. It does not mention any other appellant in this case, and in fact, the Bill of Particulars was submitted in the Imperial prosecution in which Vincent Aloi was not even a defendant.

gation is to disclose the fact of wiretapping. Any reliance whatsoever on this Bill of Particulars, submitted in a different and earlier case is totally misplaced.

On the basis of this record, the only avenue open to this Court is a remand of this case so that the prosecution can make the adequate inquiry required to determine whether appellant's and the co-defendants' conversations on their premises have been subjected to electronic surveillance.

Courts now require this detailed denial or affirmance of electronic surveillance because of the Government's history of inaccuracy and untruthfulness. Late admissions of wiretapping and remands have occurred in scores of cases, and this Circuit has not been unaffected.*

In United States v. Smilow, 472 F. 2d 1193 (2nd Cir., 1973), this Court excoriated the Government's failure to make an adequate search for wiretaps, where the wiretap was not discovered until that case reached the Supreme Court:

> "If government agencies are going to employ such surveillance techniques, responsibility for accurate description to the courts of the results of these efforts rests with those who make the report. See 18 U.S.C. § 3504 . . .. We trust, in the future, the Government will be more thorough in the investigation of such matters." (Id. at 1194)

* E.g., United States v. Friedland, 316 F. Supp. 459 (S.D.N.Y., 1970, aff'd. 441 F. 2d 855 (2nd Cir.), cert. denied, 404 U.S. 867 (1971); United States v. Derist, 277 F. Supp. 690, 702 (S.D.N.Y.), aff'd. 384 F. 2d 889 (2nd Cir., 1967), cert. denied, 394 U.S. 244 (1969); Schiapani v. United States, supra.

This case presents another potential Smilow situation. A remand is required for purposes of determining the extent of electronic surveillance of appellant and co-defendants, and their premises.

POINT VI.

THE APPELLANT ADOPTS ALL ARGUMENTS OF THE CO-DEFENDANTS WHICH ARE APPLICABLE TO HIM.

Many of the arguments made by counsel for the co-defendants herein are applicable to appellant and are adopted pursuant to Rule 28(i) FRAP. These arguments include the insufficiency of the evidence on Count 18, the spillover prejudice from the cross-examination of Lombardo, the improper injecting of organized crime into the trial, the court's refusal to permit evidence that Hellerman had two safety deposit boxes, and the arguments on sentence made by the co-defendants Aloi and Lombardo.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT APPEALED FROM MUST BE REVERSED; COUNTS 9 AND 18 DISMISSED, AND A NEW TRIAL ORDERED ON COUNT 1. ALTERNATIVE, A NEW TRIAL SHOULD BE ORDERED ON THE THREE COUNTS.

Respectfully submitted,

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